



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

August 15, 1997

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1997-12

Jeffrey D. Colman  
Jenner & Block  
One IBM Plaza  
Chicago, Illinois 60611

Dear Mr. Colman:

This responds to your letter dated June 24, 1997, on behalf of United States Representative Jerry Costello of Illinois and his campaign committee, which requests an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the use of Mr. Costello's campaign funds to pay various expenses he has incurred for services provided by your law firm, Jenner & Block.

Representative Costello was first elected to Congress in 1988 from the 21st Congressional District of Illinois (later it was redrawn as the 12th district) and has been re-elected in each subsequent general election, including 1996. You indicate that he is also a candidate for re-election in the 1998 election cycle.<sup>1</sup> Your letter explains that, within a period beginning in September 1995 and continuing until June 1997, Mr. Costello has been subjected to allegations, widely reported in newspapers circulated within the 12th congressional district of Illinois, which relate to his relationship with Amiel Cueto. You state that Mr. Costello vehemently denies any allegation of wrongdoing. His campaign committee maintains funds which he and the committee wish to utilize to defray expenses he incurred with your law firm for a variety of legal services.

Mr. Costello and his committee believe these expenses are "campaign-related both because the specific allegations raised in the press relate to . . . [his] performance as an elected official and because certain of the allegations became campaign issues in the 1996 primary and general elections and they likely will be raised as issues in the 1998

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<sup>1</sup> Commission records indicate that Mr. Costello filed a Statement of Candidacy (FEC Form 2) for the 1998 election cycle on January 24, 1997.

election.” Because Mr. Costello has been required to respond to certain of these issues within the context of his 1996 campaign and will need to respond in the context of the 1998 campaign, he views the proposed committee expenditures for legal advisory services by your firm as necessary to his campaign for re-election. Representative Costello and his authorized committee request an opinion from the Commission concerning the propriety of using campaign funds for payments to your law firm for attorney services by members of the firm and related expenses.

## **Background**

You explain that in late 1995, Thomas Venezia (and others) were convicted in Federal court in southern Illinois on charges of gambling-related racketeering. In the course of this trial, witnesses testified about business and “political connections allegedly involving” Venezia, Cueto and Mr. Costello. This testimony was reported in the *Belleville News-Democrat* and *St. Louis Post-Dispatch*, and was made an issue in Mr. Costello’s efforts to win reelection in 1996. The request includes seven press clippings from the cited two newspapers (during the period from September 22, 1995 through October 29, 1996) and one political advertisement (published just two days before the 1996 general election) that relate, in part, to the reputed association among Mr. Costello, Venezia, and Cueto.

In August 1996, Amiel Cueto, together with two other defendants, was indicted for obstruction of justice, conspiracy, and a number of other Federal crimes. The co-defendants pled guilty. Mr. Cueto was tried between April and June 1997; he was convicted on June 11, 1997.

## **Press-Reported Specific Allegations**

According to your letter, Mr. Cueto and Mr. Costello were best friends for many years. They served as best man at each other’s weddings, and they have extremely close family relations. They also were partners in a business venture starting in the 1980s and terminating in August 1992.

You further state that, during the course of the Cueto trial, Mr. Costello, together with others, was named as an unindicted co-conspirator. However, Mr. Costello has never been charged with any wrongdoing, and he has not been identified to your firm as a subject or target of any criminal investigation. Mr. Costello voluntarily appeared before a Federal grand jury in April 1996, and, through your office, he advised both the prosecution and defense in the Cueto case that he was available to testify at the Cueto trial if they so desired. Neither side called Mr. Costello as a witness.

As is apparent from 17 press articles published between April 10 and June 18, 1997, and enclosed with your advisory opinion request, the testimony in the Cueto case

was widely reported in the media.<sup>2</sup> These articles indicate, according to your accurate summary of them, three principal allegations which formed the basis of the media's coverage of Mr. Costello. Following the Cueto trial, Mr. Costello met with the media to discuss these matters in detail. (See *St. Louis Post-Dispatch*, June 15, 1997.)

First, there was hearsay testimony that Mr. Costello was a "silent partner" in business dealings with Cueto and Venezia. Mr. Costello has repeatedly denied those allegations.

Second, an allegation was made and reported in the media that Mr. Costello, in his capacity as an elected public official and leader in the Democratic Party, met with St. Clair County State's Attorney Robert Haida in an attempt to convince Haida to vacate his position as State's Attorney, accept a judgeship, and assist in convincing John Baricevic (the Chairman of the St. Clair County Board) to appoint Cueto as State's Attorney of St. Clair County. Mr. Costello has acknowledged that he met with State's Attorney Haida and that they discussed the possibility of Haida becoming a judge, but Mr. Costello denies there was any discussion about Cueto succeeding Haida as State's Attorney. Moreover, Mr. Baricevic has confirmed that in his discussions with Haida, Haida said nothing about Mr. Costello asking Haida to assist in getting Cueto picked as State's Attorney.

Third, an allegation was made that Mr. Costello supported legislation in Congress designed to recognize the Pokagon band of the Potawatami Indians at a time when Mr. Costello allegedly had a "secret" interest in a business venture (with Cueto and another person) which would then run a land-based gambling casino on Indian property in southern Illinois. Mr. Costello acknowledged that he voted for the legislation, but he denies that he had any interest in the gambling venture.

### **Services Rendered By Jenner & Block**

You further explain that, in its capacity as counsel to Mr. Costello and his committee, the firm has carefully investigated each of the allegations discussed above, and has advised Mr. Costello with regard to his dealings with the media, the United States Attorney's Office, and Mr. Cueto's defense counsel. Specifically, your request states that members of the firm have rendered the following legal services to Mr. Costello:

1. Reviewed and monitored the allegations made against Mr. Costello in the Cueto case and reported in the media.
2. Conferred with Mr. Costello on numerous occasions with regard to the attacks made against him in the media and the testimony in the Cueto proceeding.

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<sup>2</sup> All of these articles, except one, appeared in the two newspapers cited above. One article, dated May 19, 1997, was taken from the *Chicago Sun-Times*.

3. Investigated the factual allegations set forth above, interviewed witnesses, conferred with counsel for various individuals, and reviewed documents in order to work with Mr. Costello to respond to the allegations.
4. Counseled Mr. Costello with regard to his response to media attacks relating to each of the allegations.
5. Participated in the preparation and revision of press statements.
6. Conducted legal research with regard to the appropriateness of Mr. Costello testifying about the Indian recognition bill and specifically reviewed speech and debate privilege issues.
7. Represented Mr. Costello when he voluntarily appeared as a witness before the grand jury in April 1996, and interacted with the United States Attorney's Office on his behalf both in anticipation of the grand jury appearance and in conjunction with the possibility that he might testify at trial.
8. Reviewed the provisions of the Act, applicable Commission regulations, and advisory opinions with regard to the appropriateness of Mr. Costello's campaign committee reimbursing the firm for legal expenses incurred in this matter.

Your letter asserts your belief that the described legal services would not have been required but for Mr. Costello's status as an elected Federal officeholder and the fact that he ran for reelection in 1996 and intends to run again in 1998. Specifically, the allegations relating to the Indian recognition legislation and the Haida meeting involved Mr. Costello's role as an elected public official, and certain of the allegations were likely to, and indeed did, generate press coverage which impacted on his campaign in 1996 and may impact on his campaign in 1998.

### **Legal Analysis and Conclusions**

As you know, the Commission has historically recognized that candidates have wide discretion in making expenditures to influence their election. See, e.g., Advisory Opinion 1995-42. However, the Act prohibits the conversion of campaign funds to personal use. 2 U.S.C. §439a. Commission regulations at 11 CFR 113.1(g) define personal use for the purposes of this prohibition. Generally, personal use is any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder. The rules list certain uses of campaign funds that will be considered *per se* personal use. Other uses of campaign funds will be examined on a case by case basis using the general definition of personal use. 11 CFR 113.1(g)(1).

Your law firm serves as legal counsel to Mr. Costello and his authorized campaign committee. Under the personal use rules, expenses for attorney services are among those uses that will be examined on a case by case basis using the general definition of personal use. 11 CFR 113.1(g)(1)(ii)(A). Thus, the use of campaign funds for attorney fees and expenses (“legal expenses”) that would exist even if Mr. Costello were not a candidate or Member of Congress would be a conversion to personal use. Conversely, the use of campaign funds to pay legal expenses that would not exist absent his candidacy or Federal officeholder status would be permissible.

Ordinarily, legal expenses associated with refuting or responding to allegations about one’s private business ventures (whether merely contemplated or actually conducted), or regarding one’s personal association with others facing criminal prosecution, would be considered personal in nature, since, standing alone, such matters are unrelated to campaign or officeholder activity. See Advisory Opinion 1996-24 [legal counsel to Member of Congress for matters of marital status, compliance with local construction codes, veteran benefits eligibility, and tax law issues generally considered of personal nature]. However, the need for some of the services of your firm appears to have resulted directly from the political necessity for Mr. Costello to respond to allegations of wrongful conduct that were reported by the news media and alleged to have happened during periods when he was a Federal officeholder and candidate. Although these expenses could be incurred by any person who is both prominent in a given community and the subject of similar allegations, and in that sense could exist irrespective of candidacy or officeholder status, the Commission recognizes that the activities of candidates and officeholders may receive heightened scrutiny and attention because of their status as candidates and officeholders. Advisory Opinion 1996-24. The obvious need for a candidate to respond to allegations carried in the news media which result from this elevated scrutiny would not exist irrespective of the candidate’s campaign or officeholder status. *Id.*

The commission concludes that the following analysis should apply to items 1 through 7 in your list of legal services:

- 1) any legal expense that relates directly and exclusively to dealing with the press, such as preparing a press release, appearing at a press conference, or meeting or talking with reporters, would qualify for 100% payment with campaign funds because you are a candidate or federal officeholder;
- 2) any legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds;
- 3) 50% of any legal expense not covered by 1 above that does not directly relate to allegations arising from campaign or officeholder activity can be paid for with campaign funds because you are a candidate or federal officeholder and are providing substantive responses to the press (beyond pro forma “no comment” statements).

This analysis represents a slight modification of the approach used in Advisory Opinion 1996-24.

Thus, any legal expenses for preparing press releases and conducting press conferences can be paid 100% with campaign funds. Because they arise directly from your officeholder activity, the legal expenses relating to allegations that your vote in Congress was part of an impermissible plan to establish a business venture in which you held a secret interest can be paid 100% with campaign funds. On the other hand, the legal expenses relating to allegations that you were impermissibly involved with an effort to replace a state prosecutor or were improperly involved as a silent partner in business dealings with Mr. Cueto or Mr. Venezia (other than the matter associated with your legislative vote) can only be paid 50% with campaign funds. Although these expenses do not directly relate to allegations arising from your campaign or officeholder activity, you have had to conduct research and preparation to respond to the press on these matters.

In addition to the legal services described above, your letter explains that other legal services were provided by your firm to Mr. Costello, namely, item 8, legal services to research and advise with respect to the use of campaign funds for Mr. Costello's legal expenses. The expenses for such research and advice would not be incurred if Mr. Costello were not a candidate or officeholder with campaign funds that are available to him for campaign expenditures and other lawful disbursements under the Act and Commission regulations. Therefore, he may use campaign funds to pay the expenses described in item 8.

The cost of legal expenses consistent with this advisory opinion should be reported as an operating expenditure by Mr. Costello's campaign committee, with the purpose noted. See 11 CFR 104.3(b)(2) and (b)(4)(i); see also Advisory Opinions 1995-23 and 1995-21. In addition, billing documentation submitted by the firm to Mr. Costello's campaign committee should provide sufficient details as to the precise legal services rendered so that the committee has adequate records to determine which amounts are lawfully payable from campaign funds pursuant to this opinion. See 11 CFR 102.9(b) and 104.14(b).

The Commission expresses no opinion as to the possible applicability of state and Federal tax or other laws, or rules of the House of Representatives, to the matters presented in your request, since those issues are not within its jurisdiction.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

(signed)

John Warren McGarry  
Chairman

Enclosures (AOs 1996-24, 1995-42, 1995-23, 1995-21)